

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Ronald E. Shelton, Vice Pres.
Shelton Land & Cattle Ltd. d/b/a
Shelton Dairy Corp.

Complainant

v.

Robert M. Hanes

Respondent

P & S Docket No. R-95-3

Decision and Order

Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 et seq.) A timely complaint was filed on May 2, 1994, in which complainant seeks reparation against the respondent in the amount of \$5,110.42 in connection with a transaction involving the sale of 67 Holstein steers and 9 beef steers.

Each party was served with a copy of the Department's report of investigation. In addition, the respondent was served with a copy of the formal complaint. Respondent filed an answer and requested an oral hearing. As the amount in dispute did not exceed \$10,000.00, the written hearing procedure provided in Rule 13 of the Rules of Practice (9 C.F.R. §202.113) was followed.

In accordance with the Rules of Practice, the parties were given an opportunity to submit further evidence. Complainant and respondent each chose not to file additional evidence. In addition, the parties were given an opportunity to submit briefs. Robert C. Burroughs, Esq. filed a brief on behalf of respondent Hanes.

Findings of Fact

1. Complainant, Shelton Land and Cattle Ltd. d/b/a Shelton Dairy Corp. is a corporation whose business mailing address is 23043 Rd. 42, LaSalle, CO 80645. The corporation was engaged in business as a farmer and cattle feeder in La Salle, CO. Ronald E. Shelton ("Shelton"), is an individual whose mailing address is 2727 23rd Street, Greeley, CO 80631. At all times material herein, Shelton represented the corporation as Vice-President.

2. Respondent, Robert M. Hanes, ("Hanes") is an individual whose business mailing address is 2305 East 16th Street, Greeley, CO 80631. At all times material herein, Hanes was operating as a market agency buying and selling livestock on commission in interstate commerce and as a dealer buying and selling livestock in interstate commerce. Hanes was so registered with the Secretary of Agriculture.

3. On approximately March 24, 1994, complainant Shelton called respondent Hanes to discuss the sale of two loads of

Holstein and beef steers which were ready for slaughter.

Respondent advised complainant that he was too busy to come and look at the cattle. Respondent relied upon complainant's representations and called IBP's buyer to obtain prices.

4. Respondent Hanes obtained price quotes from IBP's buyer. The price quotes included discounts for choice and select carcasses which were "shipped out the door." The livestock at issue in this case graded choice or select, but did not meet IBP's standards for their fabrication program. Respondent did not disclose these discounts in the prices quoted to complainant.

5. Complainant agreed to sell the cattle to IBP, Inc., Amarillo, TX on a grade and yield basis at \$115.00/cwt. for choice Holstein steers, \$112.00/cwt. for select Holstein steers and \$119.00/cwt. for beef steers.

6. Complainant sorted and delivered 67 Holstein and 9 beef steers to IBP, Inc., Amarillo, TX. The cattle were slaughtered on March 29, 1994.

7. When IBP made payment to complainant, the settlement included price discounts on choice and select carcasses based on carcass weight, yield grade and for carcasses which were shipped out rather than used in fabrication. These were the discounts IBP had quoted to respondent for carcasses which didn't meet their standards for fabrication.

8. Complainant alleges respondent Hanes owes \$4,776.71 representing the difference between the prices quoted by

respondent and the prices paid by IBP.

9. The complaint was received within 90 days from the accrual of the cause of action alleged herein.

Conclusions

There is no dispute that complainant contacted respondent to sell two loads of cattle. Respondent obtained carcass grade & weight price quotes from IBP. The prices IBP's buyer quoted to respondent included price discounts for carcasses which didn't meet IBP'S fabrication standards. Respondent quoted complainant \$115.00/cwt. for choice Holstein steers, \$112.00/cwt. for select Holstein steers and \$119.00/cwt. for beef steers without disclosing the possibility of price discounts on carcasses which did not qualify for fabrication. Respondent received a \$1.00/cwt. commission based on the carcass weight. Respondent arranged the trucking to Amarillo, TX, without viewing the cattle.

Complainant accepted respondent's bids. Complainant sorted and shipped 67 Holstein steers and 9 beef steers to IBP, Inc. for carcass grade and weight slaughter on March 29, 1994. IBP's settlement to complainant included carcass price discounts on choice and select carcasses which did not meet IBP's fabrication standards. A \$21.00/cwt. price discount was deducted from choice and select carcasses graded by IBP as: "shipped out the door."

Complainant claims respondent failed to communicate the carcass price discounts which IBP deducted from the price of the Holstein steer carcasses which did not meet the standards for their fabrication program. Complainant further alleges the \$119.00/cwt. beef steer carcass price was quoted as a straight price. No discounts were discussed.

Respondent contends he did not view or sort the cattle. Respondent admits the carcass price discounts were explained to him by IBP's buyer, but were not disclosed to the complainant. Respondent contends complainant represented that all the steers would grade choice or select, so he did not quote the other price discounts. Respondent also contends he advised complainant not to put any heavies on the load. Respondent contends the \$119.00/cwt. beef steer price quote was for choice carcasses only.

In deciding this case, we must first determine respondent's relationship with complainant and IBP, Inc. The evidence is persuasive that neither complainant or respondent understood their business relationship. The evidence shows a \$1.00/cwt. commission based on the carcass weight was deducted from complainant's settlement and paid to respondent. IBP paid the commission in this manner based on respondent's instructions. Respondent and complainant both identify the commission as buying commission paid by IBP.

Complainant claims respondent Hanes acted as an agent for IBP, Inc. in this transaction. Complainant alleges respondent

told him that if the Holsteins were sent to Texas, he would get \$115.00/cwt. for the choice and \$112.00/cwt. for the select. Complainant's affidavit is silent concerning his agreement with respondent on the amount of commission respondent would receive and how it would be paid. In his initial telephone complaint to Margeret A. Mills, Supervisory Packer & Poultry Specialist, Denver Regional Office, Grain Inspection Packers & Stockyards Administration (GIPSA), complainant described the commission as, "on top of" the \$115.00/cwt. choice and \$112.00/cwt. select prices.

Respondent represents that his transactions with complainant and IBP were on a buying on commission basis. He stated in his affidavit, "I generally receive \$1.00/cwt. in the meat or \$.25/cwt. live weight from IBP as buying commission." Respondent's sworn answer states, "I had been a buyer, at different times for IBP over a period of eighteen years, and had continued to arrange purchases for them after IBP appointed Jim Kelleher as their representative. IBP had always paid me a commission and did pay me a commission on the March 29, 1994 transaction with Ronald E. Shelton."

During a November 3, 1994 interview with Brian Burke, Auditor, GIPSA Denver Regional Office, Jim Kelleher, an IBP cattle buyer, maintained that respondent was not their agent in this transaction. He said, "Hanes is Shelton's representative because he receives his commission from Shelton."

The record establishes that respondent contacted IBP to negotiate the sale. Acting on instructions given by the respondent, IBP deducted \$1.00/cwt. from complainant's proceeds and paid it as commission to the respondent. The \$1.00/cwt. was listed under deductions or adjustments on complainant's settlement sheet. IBP maintains that they did not pay a buying commission in this transaction because it was deducted from the settlement.

The settlement sheets show IBP paid \$116.00/cwt. for choice and \$113.00/cwt. for the select Holstein steers. Respondent reduced IBP's prices by \$1.00/cwt. to \$115.00/cwt. for choice and \$112.00/cwt. for the select Holstein steers in the price quotes given to the complainant to allow for the commission deduction. This provides some explanation for complainant's statement that the commission would be, "on top of" the price. IBP deducted the commission from complainant's settlement, but the settlement prices were \$1.00/cwt. higher than the prices quoted by respondent.

There is no course of performance from previous transactions to help us determine the relationship between respondent and complainant. The record shows complainant had been marketing cattle through respondent for 12 years, but this was the first carcass grade and weight transaction. All previous transactions had been sold FOB feedlot on a live weight basis with a 4% pencil shrink. Respondent had always viewed the cattle, obtained a bid and sorted the cattle which went on the load.

Respondent would pay complainant with a personal check after he received payment from the packer. Respondent described his compensation as a buying commission, but the record is silent on how the commission was paid in the live weight transactions.

Complainant stated that he never received a settlement sheet from the packer. However, respondent alleged in his affidavit that complainant should have known about the carcass discounts from his previous settlement sheets. Ruth Zinn, IBP Cattle Coordinator, Amarillo, TX stated in an interview with Brian Burke, Auditor, GIPSA, Denver Regional Office, that in all previous transactions where IBP had slaughtered complainant's cattle, the cattle had been killed in respondent's name. Zinn also stated the grading system involving the carcass discounts was not new.

We conclude from the evidence that respondent was not an agent for either the complainant or IBP. We are persuaded that respondent operated as a market agency selling livestock on commission independently of complainant and IBP.

Respondent was in control of the information given to complainant and IBP from his position in the middle of this transaction. Respondent stated he was paid a buying commission by IBP, but he instructed IBP to deduct the commission from the complainant's settlement. Complainant stated that commission was paid, "on top of" the price and described it as buying commission.

Personnel at IBP believed respondent was an agent for complainant Shelton based on instructions they received from

respondent to deduct commission from complainant's settlement. Complainant's previous sales to IBP had been negotiated through respondent and sold in respondent's name. Complainant received no settlement sheets before the transaction in dispute.

In this initial grade & weight transaction, complainant knew a commission was being paid, "on top of" the price. Complainant did not know respondent reduced IBP's price quotes and collected the commission as a deduction from his settlement, until he saw the settlement sheets from IBP. Complainant accepted respondent's representation made in his affidavit, that the \$1.00/cwt. was buying commission paid by IBP. Respondent continued this representation through item #7 in his sworn answer to the complaint, "There was no discussion between myself and Mr. Shelton regarding payment to me as a commission. The commission I received , ... was the commission customarily paid to me by IBP."

We can now address the issue of the price discounts in dispute in this transaction. Complainant alleges he delivered the 67 Holstein steers and 9 beef steers to IBP, Inc., Amarillo, TX based on respondent's representation that he would receive \$115.00/cwt. for choice Holstein steers, \$112.00/cwt. for select Holstein steers and \$119.00/cwt. for beef steers.

Complainant alleges respondent owes the prices quoted for the cattle because the Holstein steers, which were discounted because they did not meet IBP's fabrication standards, all graded choice

or select. Complainant claims reparation as follows:

58 Choice Hol. strs. (45,802 lbs. @ \$1.15/lb.)	\$52,672.30
9 Select Hol. strs. (6,882 lbs. @ \$1.12/lb.)	\$ 7,707.84
9 Beef Strs. (7,481 lbs. @ \$1.19/lb.)	\$ 8,902.39
Trucking 76 head to Amarillo, TX	<u>\$ (982.84)</u>
Total alleged due to complainant	\$68,299.69
IBP Check #457856 paid to complainant	(54,765.69)
IBP Check #457852 paid to complainant	<u>(8,423.58)</u>
Amount of claim	\$ 5,110.42
IBP refund of commission overpayment	<u>\$ (333.71)</u>
Alleged balance due to complainant	\$ 4,776.71

Respondent said he did not discuss the carcass price discounts with the complainant because complainant represented that all the steers would grade choice or select. Respondent claims he warned complainant not to put heavy steers on the load. Respondent contends the \$119.00/cwt. beef steer price quote was for choice carcasses.

We evaluated the evidence separately for the 67 Holstein and 9 beef steers. We observe on the Holstein steer settlement sheet that all the carcasses graded choice or select. The settlement sheet shows 37 choice carcasses and 3 select carcasses were paid at \$116.00/cwt. and \$113.00/cwt. Complainant netted the prices quoted by respondent after the \$1.00/cwt. commission deduction. The remaining 27 carcasses all graded choice or select, but the prices were discounted by IBP because the carcasses were shipped out rather than fabricated. Respondent failed to disclose to the complainant that discounts would apply if carcasses were shipped out.

The settlement sheet shows 19 carcasses graded choice - "shipped out the door," and 6 carcasses which graded select - "shipped out the door," were discounted \$21.00/cwt. We observe that these carcasses all were in the same weight ranges and quality grades as the carcasses which were paid the quoted prices. Two other choice carcasses were discounted \$22.00/cwt. One carcass weighed 958 lbs. and was discounted as heavy and the other carcass was discounted as a yield grade 4.

In his brief, respondent states that the only difference between the shipment in dispute and prior shipments was that respondent Hanes did not have time to sort the cattle. Complainant relied upon his own ability to sort the cattle. Respondent contends that he should not be held responsible for the grading of cattle he had not even seen, let alone sorted for shipping. We disagree.

The record shows the transaction in dispute was the first carcass grade & weight sale by complainant. This transaction was very different from previous transactions based on live weight. We conclude that complainant's ability to sort the cattle did not cause the dispute over the price discounts. The 76 steers complainant selected and loaded included one heavy and one yield grade 4 Holstein carcass. The beef steers included one carcass which graded below select. The dispute resulted from respondent's failure to fully disclose the possible price discounts which respondent admits were included in the price quotes he received

from IBP's cattle buyer.

We are persuaded by the evidence that respondent was negligent in communicating the IBP price quotes to respondent. The Holstein steer carcasses, which IBP discounted, satisfied the grades required to receive the prices respondent quoted to complainant. Respondent represented that IBP would pay complainant \$115.00/cwt. for choice and the \$112.00/cwt. for select Holstein steers. We find respondent is responsible to complainant for the \$21.00/cwt. discount IBP deducted from the quoted prices on the 19 Holstein steer carcasses which graded choice - "shipped out the door," and 6 Holstein steer carcasses which graded select - "shipped out the door." We find respondent is not responsible for the discounts on the choice yield grade 4 carcass and the choice over 950 lbs. carcass. We recognize respondent didn't sort the cattle. Complainant had the opportunity to see and remove the heavy steer and the over finished yield grade 4 steer when he sorted the load.

The price discounts on the beef steers resulted from carcass grades. The settlement sheet for the 9 beef steers showed 5 choice carcasses were paid at \$119.00/cwt. Three carcasses were discounted \$3.00/cwt. because they graded select and one carcass was discounted \$33.00/cwt. for grading as a cutter. We find the discounts on the beef cattle were reasonable. It is unreasonable for complainant to expect respondent to pay a flat price for the beef cattle regardless of grade when the prices quoted for the

Holsteins included a \$3.00/cwt. discount for select carcasses. We accept respondent's assertion that \$119.00/cwt. was the choice price. No damages are awarded on the beef steers.

Repondent's liability in this matter stems from his breach of his fiduciary responsibility to the complainant. Operating as a market agency, respondent operated on a commission deducted from the complainant's proceeds and respondent, acting on behalf of his principal, complainant, had the duty of apprising his principal of all the terms and conditions of the bid. By failing to make the information available to the complainant, respondent made it impossible for complainant to make an informed choice of the appropriate venue for the sale of the cattle. For these reasons, we find the respondent liable to complainant.

The damages are calculated by reducing the IBP settlement sheet prices by \$1.00/cwt. to allow for commission to obtain the prices respondent quoted to complainant. The damages for the 67 Holstein steers are calculated as follows:

56 Choice Hol. str.(43,943 lbs. @ \$1.15 lb.)	\$50,534.45
9 Select Hol. str.(6,882 lbs. @ \$1.12 lb.)	\$ 7,707.84
1 Choice Hol. str. 950up (958 lbs. @ \$.93 lb.)	\$ 890.94
1 Choice Hol. str. Yld.4 (901 lbs. @ \$.93 lb.)	\$ 837.93
Trucking 67 Hol. Strs. to Amarillo, TX	\$ (860.55)
Total due to complainant	\$59,110.61
IBP Check #457856 paid to complainant	(54,765.69)
IBP Check for commission overpayment	(333.71)
Total damages due to complainant	\$4,011.21

In his brief, respondent also questions the removal of IBP, Inc. as a respondent. Section 308 of the Packers & Stockyards Act allows that any persons subject to the Act who violate it's provisions shall be held liable to the person or persons injured for damages. It also provides that liability can be enforced by complaint before the Secretary as provided by Section 309 of the Act or by suit in any U.S. District Court. The language suggests that a complaint before the Secretary or suit in U.S. District Court could be filed against a packer. Section 309 removes the ability of a complainant to file a reparation complaint before the Secretary against a packer by limiting respondents in such actions to stockyard owners, market agencies and dealers.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to the delegated authority, 7 C.F.R. §2.35, as authorized by the Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c.-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C. 1982 Ed., App. pg. 1068. It constitutes "an order for payment of money" within the meaning of Section 309(f) of the Act, 7 U.S.C. §210(f), which provides for enforcement of such an order by court action begun by complainant.

It is requested that, if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such action, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D.C. 20250-1400. On a petition

to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice (9 C.F.R. §202.117).

On a complainant's right to judicial review of such an order, see 5 U.S.C. §702-3 and United States v. I.C.C., 337 U.S. 426 (1949). On a respondent's right to judicial review of such an order, see Maly Livestock Commission v. Hardin et al, 446 f.2d. 4, 30 Agric. 1063 (8th Cir. 1971); and Fort Scott Sale Co., Inc. v. Hardy, 570 F.Supp. 1144, 42 Agric. 1079 (D Kan. 1983).

Order

Within 30 days from the date of this order, respondent Hanes, shall pay to complainant Shelton Land & Cattle Ltd. d/b/a Shelton Dairy Corp., as reparation, \$4,011.21 with interest thereon at the rate of 10 percent per annum from April 1, 1994 until paid.

Copies of this order shall be served upon the parties

Done at Washington, D.C.

JAN 10 1997
WILLIAM G. JENSON

JUDICIAL OFFICER
Office of the Secretary